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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT TACOMA

8 NORA WILLIAMS,

9 Plaintiff,

v.

10 RICHARD V. SPENCER, Secretary of
11 the Navy,

12 Defendant.

CASE NO. C16-5945 BHS

ORDER GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

13 This matter comes before the Court on Defendant Richard Spencer's, Secretary of
14 the Navy, ("Navy") motion for summary judgment. Dkt. 20. The Court has considered
15 the pleadings filed in support of and in opposition to the motion and the remainder of the
16 file and hereby grants the motion for the reasons stated herein.

17 **I. PROCEDURAL HISTORY**

18 On November 10, 2016, Plaintiff Nora Williams ("Williams") filed a complaint
19 against the Navy asserting claims for denial of reasonable accommodation, hostile work
20 environment, and retaliation. Dkt. 1. On January 11 and May 27, 2017, Williams filed
21 amended complaints asserting similar claims. Dkts. 5, 14.
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1 On June 7, 2018, the Navy filed a motion for summary judgment. Dkt. 20. On
2 July 3, 2018, Williams responded. Dkt. 30. On July 5, 2018, Williams filed a third
3 amended complaint upon consent of the Navy and the Court. Dkt. 32. Williams asserted
4 that she had inadvertently cited to the Americans with Disabilities Act, 42 U.S.C. §
5 12101, *et seq.* (“ADA”), instead of the Rehabilitation Act of 1973, 29 U.S.C. § 791, *et*
6 *seq.* (“Rehabilitation Act”). *Id.* On August 3, 2018, the Navy replied. Dkt. 35.

7 II. FACTUAL BACKGROUND

8 During the relevant period, Williams was employed as a civilian employee by the
9 Department of the Navy, Naval Facilities Engineering Command (“NAVFAC”) as a
10 contract specialist at the Bremerton Naval Facility. In January and May 2014, Williams
11 experienced two disturbing occurrences in the workplace. In the first incident, a co-
12 worker referred to as CM made a punching gesture towards Williams, stopping his fist
13 just inches from her face. After an investigation, management told CM to stay away
14 from Williams, which CM complied with except for one work-related interaction that did
15 not seem to distress Williams. In the second incident, a male co-worker slapped her
16 buttocks. After an investigation, management imposed a two-week suspension on the co-
17 worker. Williams had no further contact with this co-worker.

18 In July 2014, Williams began to experience anxiety attacks as a result of the
19 incidents and submitted a request for a reasonable accommodation (“RA”). On
20 December 31, 2014, Williams and NAVFAC’s Deputy Equal Employment Opportunity
21 Officer, Kevin Kirkpatrick (“Kirkpatrick”), agreed to the RA of Williams teleworking on
22 a full-time basis. Dkt. 23-3, ¶ 3. Kirkpatrick required Williams to come into the office at

1 | least once a pay period and for in-person meetings. *Id.* The RA was to be “evaluated and
2 | revisited in three months to determine its effectiveness.” *Id.* ¶ 4. While the parties were
3 | negotiating the RA, Williams took an extended leave of absence. Williams returned from
4 | her leave of absence on January 7, 2015. Dkt. 23, Declaration of Kevin Kirkpatrick, ¶ 3.

5 | In May 2016, LeRoy Rushing (“Rushing”) replaced Jim Niles as Williams’ first
6 | line supervisor. Dkt. 25, Declaration of LeRoy Rushing (“Rushing Dec.”), ¶ 2. On May
7 | 4, 2016, Roy sent an email regarding work issues with the team and included a
8 | requirement that telework and overtime employees provide a more detailed list of their
9 | completed work. Dkt. 31-3 at 2. Williams did not immediately object to this new
10 | timekeeping requirement. Rushing Dec., ¶ 3. On May 9, 2016, Rushing informed
11 | Williams that “the requirement to review her RA had expired and it needed to be
12 | revisited.” *Id.* ¶ 3. Williams filed an Equal Employment Opportunity (“EEO”) complaint
13 | alleging that Rushing’s actions constituted a denial of her RA. Dkt. 31-5

14 | On May 10, 2016, Williams emailed Charles Monie (“Monie”), a supervisor above
15 | Rushing, stating that her RA had been terminated and asking for an explanation why this
16 | had happened. Dkt. 31-4 at 2–3. Williams copied Rushing on the email, and Rushing
17 | responded that Williams needed to bring the issue to him as her direct supervisor before
18 | contacting supervisors up the chain of command. *Id.* He also denied that he said the RA
19 | was terminated and clarified that the RA had expired and that he and the RA specialist
20 | needed to revisit it. *Id.* Monie eventually informed Rushing that Monie was an
21 | appropriate person for Williams to contact regarding issues with her RA and that, absent
22 | some indication that a RA is not working, there is no reason to review the RA. Dkt. 31-

1 19 at 11–18 (ECF pagination). Moreover, in regard to Williams’s concerns, the Navy
2 decided to postpone any review of the RA because Rushing and Williams’s team was
3 entering the busy part of the year for their work. Rushing Dec., ¶ 2.

4 On August 11, 2016, the Navy informed Williams that she would be interviewed
5 as part of an official administrative investigation. Dkt. 31-9. The interviewer was
6 Samuel Vitaro (“Vitaro”), and the investigation was based on allegations of Williams’s
7 misconduct as follows:

8 a. Recording conversations in the workplace via a video/audio
recording device.

9 b. Making the statement to co-workers regarding “second
10 amendment solutions” and other comments concerning her concealed carry
firearms permit and her concerns that she cannot bring a firearm to work.

11 c. Discussing issues such as Reasonable Accommodation, Equal
Employment Opportunity cases, and conflicts with management with
12 coworkers to the extent it has been disruptive.

13 *Id.* at 2. The Navy refused to allow Williams to have an attorney present during her
interview.

14 On August 25, 2016, Williams filed another EEO complaint alleging four
15 violations of her rights. She alleged a denial of her RA because of Rushing’s time-
16 keeping requirements and because, under those requirements, she was directed to come
17 into work under “emergency” circumstances more than the RA allowed. Dkt. 31-11 at 5.
18 She alleged retaliation in the form of (1) the official investigation, (2) Vitaro subjecting
19 her to disability and sexual harassment during his interview, (3) Rushing engaging in
20 adverse employment actions by assigning work that was already overdue, and (4)
21 supervisors failing to take action to stop ongoing harassment. *Id.* She alleged age
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1 discrimination by Rushing in that he (1) stated that older workers should just retire and
2 (2) he reviewed older workers' work with increased scrutiny. *Id.* at 5–6. Finally, she
3 alleged ongoing retaliation because of her prior EEO activity. *Id.* at 6.

4 Williams contends that her anxiety worsened during the next couple of months.
5 On October 13, 2016, Williams wrote her second level supervisor, Lieutenant
6 Commander William Pitcairn, requesting disability retirement and asking him to
7 complete the appropriate paperwork. Dkt. 26, Declaration of William Pitcairn, ¶ 4. On
8 October 20, 2016, Williams requested two weeks of sick leave that was approved. *Id.*
9 On October 26, 2016, Williams requested leave under the Family and Medical Leave Act
10 (“FMLA”) that was also approved. *Id.* On October 31, 2016, Williams submitted the
11 FMLA paperwork and indicated a return date of January 1, 2017. *Id.*; Dkt. 31-16 at 2–6.
12 As her return date approached, Williams submitted a letter from her psychologist stating
13 that returning to work, even under the terms of the RA, would exacerbate her medical
14 issues and severely impact her ability to complete her work. Dkt. 31-16 at 7. Williams
15 did not return to work at the end of her FMLA leave. Instead, she exhausted her sick and
16 annual leave and then entered leave without pay status. Dkt. 21, ¶ 2.

17 On February 10, 2017, Pitcairn issued Williams a letter of caution based on
18 Vitaro’s investigation. Dkt. 31-13. The letter provides in relevant part as follows:

19 I have reviewed the investigative report and concur with the
20 findings. I conclude that the inappropriate conduct described above has
21 disrupted the workplace and had an adverse effect on the work
22 environment. Accordingly, you are hereby put on notice that making
statements about guns being brought into the workplace and wearing or
bringing a video/audio recording device in the workplace to record
conversation, or to use as a deterrent, is disruptive and causes a chilling

1 effect to the workplace. Also, discussing personal matters to include
2 conflicts that you have with co-workers and management is disruptive and
3 unwelcome. The statements and behaviors that you have demonstrated have
4 the potential to cause your co-workers concern or otherwise disrupt the
workplace. Please refer to enclosure (1), the Naval Facilities Engineering
Command, Northwest Code of Conduct for expected behavior in the
workspace.

5 I hereby put you on notice the behaviors identified above are
6 disruptive and inappropriate and will not be tolerated. If further infractions
of these types of behavior continue it could lead to more severe corrective
action.

7 This letter of caution will not be made a matter of record in your
8 Official Personnel Folder, but will be retained by the Agency. Although it
9 will not be counted as a prior offense when determining a remedy for any
future offense under the Guideline Schedule of Disciplinary Offenses and
Recommended Remedies, it may be counted as a factor in determining the
appropriate remedy for a first, second, or third offense from a range of
possible remedies

10 This letter is not grievable per Article 20, of reference (a), nor
11 appealable to the Merit Systems Protection Board under 5 CFR 752.301 or
752.401.

12 *Id.* at 4–5.

13 On February 14, 2017, Williams’s psychologist wrote another letter opining that
14 he agreed with her decision to apply for disability retirement and that it would be
15 inadvisable for Williams to return to work under any circumstances. Dkt. 31-16 at 8. In
16 March 2018, Williams’s disability retirement paperwork was completed and she formally
17 retired.

18 **III. DISCUSSION**

19 **A. Summary Judgment Standard**

20 Summary judgment is proper only if the pleadings, the discovery and disclosure
21 materials on file, and any affidavits show that there is no genuine issue as to any material
22 fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

1 The moving party is entitled to judgment as a matter of law when the nonmoving party
2 fails to make a sufficient showing on an essential element of a claim in the case on which
3 the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317,
4 323 (1986). There is no genuine issue of fact for trial where the record, taken as a whole,
5 could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec.*
6 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must
7 present specific, significant probative evidence, not simply “some metaphysical doubt”);
8 *see also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists if
9 there is sufficient evidence supporting the claimed factual dispute, requiring a judge or
10 jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477
11 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d
12 626, 630 (9th Cir. 1987).

13 The determination of the existence of a material fact is often a close question. The
14 Court must consider the substantive evidentiary burden that the nonmoving party must
15 meet at trial—e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477
16 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The Court must resolve any factual
17 issues of controversy in favor of the nonmoving party only when the facts specifically
18 attested by that party contradict facts specifically attested by the moving party. The
19 nonmoving party may not merely state that it will discredit the moving party’s evidence
20 at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W.*
21 *Elec. Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson*, 477 U.S. at 255). Conclusory,
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1 nonspecific statements in affidavits are not sufficient, and missing facts will not be
2 presumed. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888–89 (1990).

3 **B. Reasonable Accommodation**

4 Although Williams argues that the Navy denied her a RA, she fails to clearly
5 articulate how this denial occurred. *See* Dkt. 30 at 10–13. In fact, Williams concedes
6 that the Navy provided her a RA. *Id.* at 10 (“Williams and the [Navy] went through the
7 reasonable accommodation process and agreed to a reasonable accommodation.”). Thus,
8 Williams’s real argument is that “the reasonable accommodation was violated.” *Id.* at 11.
9 As the Navy asserts, Williams “offers no legal support for her argument that a subsequent
10 supervisor’s different construction of the terms of a reasonable accommodation
11 agreement constitutes a denial of her reasonable accommodation.” Dkt. 35 at 3. At most,
12 Rushing altered the terms of the existing RA, but Williams fails to show that such
13 alterations result in liability. On this issue, “the duty to accommodate ‘is a continuing
14 duty’” *Humphrey v. Mem’l Hosps. Ass’n*, 239 F.3d 1128, 1138 (9th Cir. 2001)
15 (quoting *McAlindin v. Cty. of San Diego*, 192 F.3d 1226, 1237 (9th Cir. 1999), *opinion*
16 *amended on denial of reh’g*, 201 F.3d 1211 (9th Cir. 2000)). Both sides have the
17 continuing obligation to communicate and engage in good faith negotiation to determine
18 an accommodation that works for the employee and the employer. *Humphrey*, 239 F.3d
19 at 1138.

20 Under these standards, Williams fails to show any violation of the Navy’s duty to
21 accommodate. It is undisputed that Rushing imposed additional time keeping
22 requirements and/or work tracking requirements. The initially agreed upon RA, however,

1 explicitly included such daily activity tracking. *See* Dkt. 23-3 at ¶ 4 (Williams required
2 to provide “a short bulleted statement each day of the significant actions worked on such
3 as BCM’s, project milestones accomplished, training, significant correspondence, RFI’s,
4 PPI’s; as well as an explanation of any variations to your normal work hours - travel time
5 to and from the office, etc.”). The fact that Rushing required the statement in a different
6 format or with more extensive documentation than Williams’s previous supervisor does
7 not amount to a denial of her RA. Instead, it triggered her duty to communicate that the
8 requirement was unreasonable or impeded her ability to complete her required work,
9 which would have initiated the interactive process to reach an agreement on this issue.
10 Rushing imposed the new requirements in May 2016, and Williams gave formal notice
11 that the requirements were burdensome in late August 2016. Williams then went on
12 leave approximately five weeks later and never returned to work. If anything, Williams
13 failed to engage in good faith negotiations with the Navy to reach an amicable
14 accommodation. Regardless, Williams fails to show that Rushing’s increased reporting
15 requirements or the Navy’s response once Williams formally objected to these
16 requirements violated her rights in any way. Therefore, the Court grants the Navy’s
17 motion on this issue.

18 Likewise, Williams fails to show that Rushing’s alleged overuse of the provision
19 requiring her to come to the office resulted in a denial of her RA. Once she formally put
20 the Navy on notice of her displeasure, she failed to engage in any process to alter her RA.
21 Therefore, the Court grants the Navy’s motion on Williams’s failure to accommodate
22 claim.

1 **C. Retaliation**

2 The ADA and ADA case law provide the substantive law for Rehabilitation Act
3 claims. *See, e.g., Newland v. Dalton*, 81 F.3d 904, 906 (9th Cir. 1996) (citing 29 U.S.C.
4 § 791(g)). Retaliation claims under the Rehabilitation Act are subject to the burden-
5 shifting framework outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–
6 04 (1973). *Curley v. City of N. Las Vegas*, 772 F.3d 629, 632 (9th Cir. 2014). Under that
7 framework, an employee challenging an adverse employment action has the initial burden
8 of establishing a prima facie case of retaliation. *Id.* The burden then shifts to the
9 employer to provide a legitimate, nonretaliatory reason for the adverse employment
10 action. *Id.* If the employer does so, then the burden shifts back to the employee to prove
11 that the reason given by the employer was pretextual. *Id.*

12 To show a prima facie case of disparate treatment under the Rehabilitation Act,
13 Williams must show that, within the meaning of the statute, she: “(1) is disabled; (2) is
14 qualified; and (3) suffered an adverse employment action because of her disability.”
15 *Snead v. Metro. Prop. & Cas. Ins. Co.*, 237 F.3d 1080, 1087 (9th Cir. 2001). Regarding
16 the adverse employment action, Williams must show that the complained-of action
17 “materially” affected a term of her employment. *Davis v. Team Elec. Co.*, 520 F.3d
18 1080, 1089 (9th Cir. 2008). Regarding causation, Williams must show “that the unlawful
19 retaliation would not have occurred in the absence of the alleged wrongful action or
20 actions of the [defendant].” *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 360
21 (2013); *T.B. ex rel. Brenneise v. San Diego Unified Sch. Dist.*, 806 F.3d 451, 473 (9th
22 Cir. 2015) (adopting the *Nassar* but-for causation standard for ADA retaliation claims).

1 In this case, Williams fails to establish a prima facie case of retaliation. She
2 argues that the Vitaro investigation and the Letter of Caution were adverse employment
3 actions caused by her disability and/or request for an RA. Dkt. 30 at 14–20. Regarding
4 the investigation, Williams ignores binding case law to the contrary. *Campbell v. Hawaii*
5 *Dep’t of Educ.*, 892 F.3d 1005, 1023 (9th Cir. 2018) (employer has an obligation to
6 investigate “credible allegations of misconduct”). At the very least, Williams fails to
7 show that retaliation was the but-for cause of the investigation, because Pitcairn initiated
8 the investigation based on co-workers’ complaints that Williams was engaging in
9 disruptive and inappropriate behavior. Dkt. 13-3 at 4.

10 Similarly, Williams fails to establish that the Letter of Caution was an adverse
11 employment action or was caused by her protected activities. Williams argues that a
12 “warning letter or negative review also can be considered an adverse employment
13 action.” *Fonseca v. Sysco Food Servs. of Arizona, Inc.*, 374 F.3d 840, 847 (9th Cir.
14 2004) (citing *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987)). Although the
15 Letter of Caution could be considered a warning letter, Williams fails to show how this
16 letter materially affected a condition of her employment. Not only was the letter issued
17 when Williams was on leave that ultimately became retirement, but the letter also was not
18 placed in her personnel file and did not count as a prior offense for any subsequent
19 action. Moreover, Williams fails to establish that retaliation was the but-for cause of the
20 letter, which was drafted on an independent third-party investigator’s recommendation
21 that the Navy counsel Williams on the disruptiveness of her actions. Therefore, the Court
22 concludes that Williams fails to establish a prima facie case of retaliation.

1 Even if Williams had met her burden at the initial step, the Navy meets its burden
2 and Williams fails to establish pretext. The Navy submits facts to establish that the
3 investigation was initiated by co-workers' complaints, which is a legitimate, non-
4 retaliatory reason for the action. Similarly, Pitcairn drafted the letter based on Vitaro's
5 recommendation to counsel Williams regarding her actions. In return, Williams fails to
6 submit any evidence to establish pretext. Instead, she argues that the external
7 investigation and its cost of \$56,000 is sufficient to establish pretext. Dkt. 20–21. Her
8 arguments are unpersuasive because these facts do not show that the Navy's "proffered
9 explanation is unworthy of credence." *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1089
10 (9th Cir. 2008). Accordingly, Williams's retaliation claim fails for numerous reasons.

11 **D. Hostile Work Environment**

12 Williams refers to a hostile work environment throughout her argument regarding
13 retaliation. *See* Dkt. 30 at 14–22. Williams, however, fails to cite any authority for the
14 proposition that a hostile work environment in general is any part of a retaliation claim.
15 While it is true that certain adverse actions could support both a retaliation claim and a
16 hostile work environment claim, Williams has failed to show any other overlap between
17 such claims. To the extent that Williams asserts a hostile work environment claim, the
18 Navy is entitled to judgment on this claim because Williams has failed to establish
19 actions so severe or pervasive as to alter the conditions of her employment or create an
20 abusive work environment. *Vasquez v. Cty. of Los Angeles*, 349 F.3d 634, 642 (9th Cir.
21 2003), as amended (Jan. 2, 2004).
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1 **IV. ORDER**

2 Therefore, it is hereby **ORDERED** that Navy's motion for summary judgment,
3 Dkt. 20, is **GRANTED**. The Clerk shall enter a **JUDGMENT** and close the case.

4 Dated this 19th day of October, 2018.

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7 BENJAMIN H. SETTLE
8 United States District Judge
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